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HB 1113 and HB 1642 RELATING TO COASTAL ZONE MANAGEMENT

Statement for
House Committees on
Water, Land Use, Development, and Hawaiian Affairs
Ecology and Environmental Protection
Public Hearing - 26 February 1979
by
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HB 1113 and HB 1642 both propose to amend Chapter 205A, Hawaii Revised Statutes related to Coastal Zone Management. This statement on these bills does not reflect an institutional position of the university.

The preparation of this statement has presented a special problem for the Environmental Center. The members of the University Community who are most knowledgeable about the Coastal Zone Management Act are staff members of the Pacific Urban Studies Planning Program. This Program has been under contract to assist the State Department of Planning and Economic Development in the development of the CZM plan. Considering this special interest on their part, it has seemed best not to involve program staff in the authorship of this statement. In its preparation I have been advised by three of the staff: Kem Lowry, Norman Okamura, and Robert Alm, but the ultimate responsibility of its content is mine.

Both HB 1113 and HB 1642 propose a number of "housekeeping" changes that would clarify ambiguities in the CZM bill enacted by the legislature in 1977 and other changes that would facilitate implementation of the program. However, there are a number of substantive differences between the two bills. These differences related to the preparation of guidelines, the special management area boundaries, and the cause of action provision. These major issues are addressed first in this testimony followed by a discussion of some of the proposed "housekeeping" changes.

Guidelines. HRS 205A-4(b) refers to "guidelines enacted by the legislature" that "shall be binding upon actions within the coastal zone management areas by all agencies." HB 1642 drops the reference to guidelines adopted by the legislature and replaces it with "any rule adopted by the lead agency."

The lead agency refers to the Department of Planning and Economic Development. HB 1113 also drops any reference to the preparation of guidelines in this section and in a previous section referring to the responsibilities of the lead agency. HB 1113 adds a paragraph stating that "(w)here conflicts between the various objectives and policies of this chapter arise, the State Plan and the County's General Plan shall be used as guides in resolving those conflicts."

I believe that greater policy specificity is desirable in implementing the coastal zone management program. I understand that it is difficult to reach consensus about specific policies or guidelines, but in the absence of such specificity, the potential for conflicts among public agencies and between public agencies and private is greatly increased. Not knowing what sorts of "rules" are likely to be proposed by the DPED under the authority they would be granted in HB 1642, it is not possible to assess whether granting rule-making authority to that agency would provide the necessary specificity. On the face of it however, the rule-making authority proposed in HB 1642 seems preferable to the conflict resolution process proposed under HB 1113.

Boundaries. The boundary issue remains one of the most controversial aspects of the coastal zone management program. When the state and the counties were unable to resolve the issue of how the boundaries were to be drawn during the 1977 legislative session, the legislature opted for the county position, which was to retain the Special Management Area (SMA) boundaries mandated by the Interim Shoreline Protection Act of 1975. These boundaries were in general to be not less than one hundred yards inland but, in some areas, they were extended further inland. Because the Interim Act was to be administered by the counties, no provision was made for including the state's territorial waters in the program. This provision was not changed by the 1977 law. However, the 1977 law did require the counties to "review and amend as necessary its special area boundaries, subject to lead agency review as to compliance with the objectives and policies of this chapter and the guidelines enacted by the legislature." The boundaries were to have been amended by June 8, 1979. Not all the counties have complied or are likely to comply with the June 8 deadline.

HB 1642 and HB 1113 propose different solutions to the boundary issues. HB 1642 defines the "coastal zone management area" as the "area provided for in the Hawaii coastal zone management program. (p. 2, line 1) Inasmuch as "coastal zone management program" is defined as "comprehensive statement in words...prepared, approved for submission, and amended by the state and approved by the United States government...", one must look at the state's program submission document to the Office of Coastal Zone Management, Department of Commerce, to determine what is meant by the coastal zone. In this document, the coastal zone is defined to include the SMA, coastal waters to the limit of the state's jurisdiction, and an "interim inland administrative boundary" which includes all remaining inland areas except those lands designated as State forest reserves.

HB 1113, on the other hand, would leave the "coastal zone" as defined by the SMA areas. Language in the 1977 bill (205A-3(7)) which empowers the DPED to review state programs within the coastal zone management area from the shoreline to the seaward limit of the state's jurisdiction is also specifically deleted by HB 1113 (p. 9, lines 12-15). HB 1113 does require, within two years, review and amendment of the SMA boundaries "as necessary" to comply with the

objectives and policies of this chapter." (p. 12, lines 16-21) It also mandates "lead agency review," but this reference does not make clear whether the DPED would have the authority to reject amendments it found to be not in compliance.

It is not possible to discuss the boundary issue independent of the problems of the distribution of regulatory authority between the state and the counties. Under the current program the preponderance of regulatory authority remains with the counties. The state has the authority to distribute coastal zone resources and the responsibility for ensuring that the counties and other state agencies comply with the program (although the sanctions for ensuring compliance and the mechanisms for determining it are not clear). HB 1113 would have the practical effect of removing the DPED's authority to ensure the compliance of other state agencies to coastal zone policies in coastal waters as well as in the interim "administrative area."

Even without evaluating the relative merits of the divergent positions with regard to the distribution of authority, it seems clear that: a) the coastal zone, however else it may be defined, should include coastal waters and an inland area sufficient to be consistent with the policies in the act; and b) without some statutory recognition of (a) the state's participation in the national coastal zone management program, and all that such participation implies with regard to funding, is seriously jeopardized. Indeed, the Office of Coastal Zone Management has repeatedly made it clear that the current SMA boundaries by themselves are not in compliance with federal requirements for participation in the program.

Cause of Action. HRS 205A-6(1) makes it possible for any person or agency to bring suit alleging that any agency "is not in compliance with one or more of the objectives, policies, and guidelines provided or authorized by this chapter." HB 1113 would amend this language to make suits possible only if an agency "has failed to comply with the overall intent of this chapter within the special management area." This amendment would require the judiciary to make a determination of whether a specific action is violative of the "overall intent." While the intent of this amendment may be to prevent "nuisance" suits, it seems unjustified given the few suits that have been filed under the first two years of the program.

Other provisions of environmental interest. Both bills would change the definition of development to exclude more activities which previously required SMA permits. While these amendments would, in general, promote the efficient implementation of the law, several of the exclusions deserve close scrutiny. The definition of development in both bills specifically excludes "any facility of any private or public utility" and the "extensive removal of vegetation, except crops." Both bills also exclude "construction...of roads and highways within existing rights-of-way" and "construction or maintenance of public recreation facilities by a public agency." The definition of development in both bills would also exclude "any agency action that appears on an exemption list approved by the environmental quality commission..." The grounds for exemption are that an action will not have a significant environmental impact, and actions on the lists are not necessarily improperly considered as developments.

Both bills contain references to the process under which SMA permits are reviewed. The counties have contended that the majority of SMA permit hearings are routine affairs attended only by the applicant, agency officials and planning commission members. HB 1113 responds to this contention by allowing unspecified changes in permit procedures. HB 1642, on the other hand, explicitly allows the planning commission to proceed without a hearing on an application only if, after public notice, no hearing has been requested. This latter provision seems preferable because of its specificity.